122—211

TRANSCRIPT OF RECORD.

608

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 280.

CHARLES BENZIGER, NICHOLAS BENZIGER, MARTIN BENZIGER AND LOUIS BENZIGER, PLAINTIFFS IN ERROR,

vs.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 29, 1884.

accession 21829

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Charles Benziger, Nicholas Benziger, Martin Benziger, and Louis Benziger, plaintiffs in error, and William H. Robertson, defendant in error, a manifest error hath happened, to the great damage of the said Charles Benziger, Nicholas Benziger, Martin Benziger, and Louis Benziger, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and eighth.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed May 28, 1884.
ALFRED C. COXE.

2 [Endorsed:] 7719. U. S. Supreme Court. C. Benziger *et al.*, pl'ffs in error, *vs.* William H. Robertson, def't in error. Writ of error. H. J. Begly, att'y for pl'ffs in error, 29 Nassau St., N. Y. Due service of a copy of the within writ of error is hereby admitted this 3d June, 1884. Elihu Root, attorney for def't in error. U. S. circuit court. Filed June 3, 1884. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty, inclusive, contain a true and complete transcript of the

records and proceedings had in said court in the case of Charles Benziger, Nicholas Benziger, Martin Benziger, and Louis Benziger, plaintiffs in error, against William H. Robertson, defendant in error, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this fourth day of August, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clk.*

3 Superior Court of the City of New York.

CHARLES BENZIGER, NICHOLAS BENZIGER, MARTIN BENZIGER, and LOUIS BENZIGER, Plaintiffs,
against
WILLIAM H. ROBERTSON, Defendant. } No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, 1 March, 1882.

H. J. BEGLY,
Plaintiffs' Attorney.

Office and post-office address: No. 29 Nassau street, New York city.

4 [Endorsed:] N. Y. superior court. No. 1. C. Benziger & *al.*, plaintiffs, ag'st W. H. Robertson, defendant. Summons. H. J. Begly, plaintiffs' attorney, No. 29 Nassau street, N. Y. To W. H. Robertson, defendant. Received Mar. 17, 1882. U. S. attorney's office.

5 (123.)

The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against William H. Robertson, defendant, by Charles Benziger & *al.*, plaintiffs, do therefore command you that the record and proceedings in said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 31 day of March, 1882, as fully and amply as the same are remaining before you, by

whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 28 day of March, in the year one thousand eight hundred and eighty-two.

[L. S.] JOSEPH M. DEUEL, *Clerk.*

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

6 [Endorsed:] U. S. circuit court. Charles Benziger & *al.* *vs.* William H. Robertson. Copy. Certiorari. Stewart L. Woodford, U. S. attorney, attorney for defendant.

Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

Yours, STEWART L. WOODFORD,
U. S. Attorney, Attorney for Defendant.

New York, March 28, 1882.

To H. J. Begly, plaintiffs' attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, March 28, 1882.

H. J. BEGLY,
Plaintiffs' Attorney.

7 Name of importer.	Description of merchandise.	Place whence imported.	Name of vessel.	Date of— Invoice.	Entry.	Payment of duties.	Protest.	Appeal.	Decision of Sec'y of Treasury.	Amount of excess claimed.
				1881.	1881.	1881.	1881.	1881.	1881.	
Benziger Brothers	Rosaries	Liverpool	Bothnia	July 5	Aug. 2	Aug. 2	Aug. 25	Aug. 29	Dec. 5	20 05
		Havre	Hermod	" 20	" 15	" 15	Sep. 16	Oct. 5	" 14	10 35
		"	Olaf	" 28	" 31	" 31	Oct. 7	" 25	" 30	11 60
		Liverpool	Gallia	Aug. 19	Sep. 13	Sep. 13	" 25	" "	" "	32 30
									1882.	
		Havre	Hermod	Sept. 12	Oct. 12	Oct. 12	Nov. 18	Dec. 9	Feb. 3	146 50
		Liverpool	Parthia	" 26	" 25	" 25	Dec. 5	"	"	43 10
								1882.		
		"	Gallia	Oct. 27	Nov. 21	Nov. 21	" 23	Jan. 14	"	39 75

8 Superior Court of the City of New York.

CHARLES BENZIGER, NICHOLAS BENZIGER, MARTIN BENZIGER, and LOUIS BENZIGER, Plaintiffs,
against
WILLIAM H. ROBERTSON, Defendant.
} No. 1. 7749.

The plaintiffs in this action complaining of the defendant, William H. Robertson, by H. J. Begly, their attorney, shows—

That at the times hereinafter mentioned they were copartners, doing business in the city of New York under the firm name and style of Benziger Brothers.

That the defendant was at the times hereinafter mentioned the collector of customs at the port and district of the city of New York.

That the plaintiffs imported into said port the various goods, wares, and merchandise in the annexed bill of particulars mentioned (which said bill of particulars is hereby made part of this complaint), in the vessels and from the places therein mentioned, and duly made entry thereof at the custom-house on the dates therein mentioned.

That on such entry the said defendant, as such collector, unlawfully demanded, exacted, and received from the plaintiffs the several sums of money in said bill of particulars mentioned, under color of a statute of the United States for the collection of duties on imports, which said several sums of money the plaintiffs, in order to obtain possession of said merchandise, paid to the said defendant, as such collector, under protest in writing in due form of law.

That the demand and exaction by the said defendant of said amounts of duties were wholly unauthorized by law.

That on the dates in said bill of particulars mentioned the plaintiff gave due notice in writing to the said defendant of dissatisfaction with his said decision and exaction aforesaid, and duly appealed therefrom to the Secretary of the Treasury of the United States, according to the form of the statute in such case made and provided.

That the said Secretary of the Treasury has decided the said appeals adversely to the plaintiff-, except as to the appeals in said bill of particulars, whereon no date of decision is mentioned, and on such appeals the said Secretary has rendered no decision, although more than ninety days have elapsed since the dates thereof.

That by reason of the premises the said defendant is justly indebted to the plaintiff- in the several sums of money in said bill of particulars mentioned, with interest from the dates of said payments, which said sums the said defendant, although requested, has hitherto wholly neglected and refused to pay to the plaintiffs.

Wherefore the plaintiff- demand judgment against the said defendant for the sum of five hundred dollars, with interest as aforesaid, together with the costs of this action.

H. J. BEGLY,
Plaintiffs' Attorney, 29 Nassau Street, New York.

9 [Endorsed:] No. 7749. N. Y. superior court. C. Benziger & *al.*, *vs.* W. H. Robertson. No. 1. Complaint and bill of particulars. H. J. Begly, plaintiffs' attorney, 29 Nassau street, New York. Hon. S. L. Woodford, defendant's attorney. Received Mar. 23, 1882, U. S. attorney's office.

10 United States Circuit Court, Southern District of New York.

CHARLES BENZIGER & *al.*
versus
W. H. ROBERTSON, Collector, etc.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiffs in the above-entitled action.

I. He admits he was, at the times in said complaint mentioned, collector of the port of New York, and, in such official capacity, received payment from the plaintiffs for and on account of duties due to the United States, under the laws thereof, upon certain importations of merchandise imported by said plaintiffs into the port of New York from foreign countries.

II. He alleges that any and all moneys received by him from plaintiffs at the times in said complaint mentioned were paid by said plaintiffs as a debt due by them to the United States, and not otherwise, and were received by defendant by virtue of his office as said collector, and under the direction of the Secretary of the Treasury, and for and on account of the United States, and were forthwith thereafter and before the commencement of this action, or the service of any protest, paid into the Treasury of the United States; and that the amount of said moneys so received from plaintiffs were the amounts due from them to the United States according to the rate of duty imposed by law upon the several articles of merchandise by them imported and assessed with the duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's import entry thereof were collected or received by defendant from the plaintiffs.

III. And defendant, further answering, denies that he has at this time sufficient information to form a belief as to the precise description of the merchandise contained in the several packages referred to in the said complaint by the marks and numbers and description there given, except in so far as to state, and defendant herein, answering, doth aver and state, that said merchandise was not dutiable according to the laws of the United States at the rates specified in the complaint.

IV. And defendant, further answering, admits that plaintiffs filed with defendant certain protests, but he denies that he has sufficient information to form a belief as to whether, upon the importations in question, protests and appeals were made by the plaintiffs conformable to the laws of the United States, and defendant leaves plaintiffs to make such proof thereof as they may be advised.

V. And as to any other allegations in said complaint contained

not hereinbefore fully answered or admitted defendant denies the same and each thereof and leaves the plaintiffs to make such proof thereof as they may be advised.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

11 [Endorsed:] U. S. circuit court, southern district of New York. Charles Benziger & *al. vs.* W. H. Robertson, collector, etc. Answer. Stewart L. Woodford, United States attorney, attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, March 29, 1882. H. J. Begly, plaintiffs' attorney. To H. J. Begly, plaintiffs' attorney.

12 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the nineteenth day of December, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Alfred C. Coxe, acting circuit judge.

CHARLES BENZIGER & *al.*
vs.
WILLIAM H. ROBERTSON. } 7749.

Now come the plaintiffs, by H. J. Begly, their attorney, and move the trial of this cause; likewise comes the defendant, by Sam'l B. Clarke, assistant U. S. attorney, his attorney. Thereupon a jury is impannelled and the cause proceeds to trial.

After hearing the evidence of the parties, and under the direction of the court, the jury retire, and upon their return render a verdict whereby they find for the defendant.

On motion of plaintiffs' counsel, the court orders that the plaintiffs have a stay of proceedings on said verdict for thirty days.

A copy.

[SEAL.] TIMOTHY GRIFFITH, *Clerk.*

13 *Judgment.*

United States Circuit Court, Southern District of New York.

CHARLES BENZIGER & *al.*
vs.
WILLIAM H. ROBERTSON. } 7749.

The issues in this action having been brought on for trial before Mr. Judge Coxe and a jury, at a circuit court of the October term, 1883, and the issues having been tried, and a verdict for the defendant having been duly rendered on the nineteenth day of December, 1883, and his costs having been adjusted at $48.85—

Now, on motion of Elihu Root, United States attorney, for defendant, it is adjudged that the defendant have judgment against the

plaintiffs upon the issues in this action, and that he recover the sum of $48.85, his taxed costs, and have execution therefor.

Judgment signed this 20th day of May, 1884.

JOHN A. SHIELDS,
Deputy Clerk.

14 [Endorsed:] United States circuit court. Charles Benziger & *al. vs.* W. H. Robertson. Judgment-roll. Elihu Root, United States attorney, for defendant. Costs, $48.85. U. S. circuit court. Filed May 20, 1884, 11 o'clock. Timothy Griffith, clerk.

15 *Bill of Exceptions.*

Circuit Court of the United States for the District of New York.

CHARLES BENZIGER *et al.*
vs.
WILLIAM H. ROBERTSON. } 7749.

Afterwards, to wit, on the 19th day of December, 1883, at a stated term of this court, begun and holden at the city of New York, to wit, on the third Monday of October, 1883, before the Honorable Alfred C. Coxe, district judge for the northern district of New York, duly assigned to hold the October term of this court aforesaid, the aforesaid issue so joined as between the said parties as aforesaid, as by the record more fully appears, came on to be tried by a jury duly empanelled and sworn for that purpose, the said plaintiffs being represented by H. J. Begly, Esquire, and the said defendant by Samuel B. Clarke, Esquire.

And, in the course of the trial, the said counsel for the plaintiffs did take and allege sundry exceptions to the rulings and charges of the court, and to the refusal of the court to give instructions to the jury as then and there prayed for by him; which said exceptions are hereinafter severally set forth.

16

On the trial the following facts appeared:

It was agreed that if the jury should find the plaintiffs entitled to recover on the main issue the verdict should be subject to adjustment under direction of the court as to amount and as to performance by plaintiffs of the statutory prerequisites to the maintenance of suit.

The plaintiffs filed protests in writing on each entry against the exaction of 50 % duties. The grounds of dissatisfaction stated in the several protests were as follows:

Importation per Steamship Bothnia, August 2, 1881.

"Because said rosaries are not beads and bead ornaments, but are manufactures of bone, wood, pearl, glass, and steel, and are, under Schedules B, E, K, and M of section 2504 of title 33 of the Revised Statutes of the United States, passed June 22, 1874, only liable to duty at the rate of 35, 40, and 45 per centum ad valorem, respectively."

Importation per Steamship Hermod, August 15, 1881.

"Because said merchandise, being manufactures of wood, or of which wood is the chief component part, not otherwise provided for, is, under Schedule K, of section 2504," &c., &c., continuing as above and claiming proper rate to be 35 per centum.

17 *Importation per Steamship Olaf, August* 31, 1881, *and Gallia, September* 13, 1881.

"Because said merchandise, being manufactures, a portion of wood, a portion of ivory, a portion of pearl, a portion of glass, and a portion of silver, is under Schedules B, E, K, and M, of section 2504," &c., continuing as above, and claiming proper rate to be 35 and 40 per centum, respectively.

Importation per Steamship Freja, November 15, 1881.

"Because said merchandise, being a portion manufactures, of which wood is the chief component part, and another portion manufactures of bone, is under Schedules K and M," continuing as above and claiming proper rate to be 35 per centum.

It was proved that the articles in question were imported and entered at the port of New York by the plaintiffs under the firm name of Benziger Brothers; that they are composed of beads, a metal chain, and a cross (the beads being fastened on the chain at regular intervals); that a rosary is not complete without a cross; that they are used by Roman Catholics in counting their prayers; that they are carried in the pocket when not so in use, and are never worn or used for ornament. In all cases the beads are the component material of chief value; that they are dealt in only by dealers in religious and devotional articles pertaining to the Catholic
18 Church, and are not dealt in by those who deal generally in beads and bead ornaments and are not known to them.

That the expression, "I say the beads," is sometimes applied to the devotional exercises which are performed on rosaries.

The component materials of the various rosaries included in the invoices were as follows:

1. Beads, glass; chain and cross, metal.
2. Beads, wood; chain and cross, metal.
3. Beads, chain, and cross all of steel.
4. Beads, bone; chain and cross, metal.
5. Beads, ivory; chain and cross, metal.
6. Beads, chain, and cross all of silver.
7. Beads, mother-of-pearl; chain and cross, metal.

The witnesses for the plaintiffs testified that the articles in question are known to importers and wholesale dealers as rosaries, and are dealt in under that name, and are not dealt in under the name of beads; that dealers in rosaries also deal in the beads not made up into rosaries, but fastened together on a cotton string, which they sell to parties to be made up into rosaries.

That an order for beads would be understood to mean these beads and not the ones made up into rosaries; that the people who use rosaries sometimes call them "beads" and sometimes "rosaries."

19 The witness for the defandant testified that they are called beads or rosaries and are bought and sold under the name of beads; that in point of fact they are made of beads and are called beads and rosaries irrespective of the material of which the beads are composed.

On cross-examination he testified as follows:

Q. What class of people call them beads?
A. Well, I think people in New York.
Q. What class of people in New York?
A. A great many Catholics call them beads, and a great many call them rosaries.
Q. Don't the dealers call them rosaries, and so catalogue them?
A. Yes, sir.

On these facts the plaintiffs moved the court to direct the jury to find a verdict for the plaintiffs, which motion the court denied; to which denial and refusal the plaintiffs then and there duly excepted.

The defendant's counsel thereupon requested the court to direct the jury to find a verdict for the defendant, and the court thereupon so directed the jury; to which direction the plaintiffs' counsel then and there duly excepted.

And because none of the said exceptions so offered and made to the opinions, instructions, and decisions of the court do appear upon the record of the said trial, therefore, on the prayer of the said plaintiffs, by their counsel, the said judge has to this bill of exceptions put his seal *nunc pro tunc* as of the 19th day of December.

ALFRED G. COXE,
Acting Circuit Judge.

20 (Endorsed:) U. S. circuit court, southern district of N. Y. Chas. Benziger *et al. vs.* Wm. H. Robertson. Bill of exceptions. H. J. Begly, pl'ffs' att'y, 29 Nassau St., New York. The within bill of exceptions is correct, and the right to propose amendments on the part of the defendant is hereby waived. New York, 17 March, 1884. Elihu Root, U. S. att'y, counsel for def't. U. S. circuit court. Filed Mar. 24, 1884. Timothy Griffith, clerk.

21 Supreme Court of the United States.

CHARLES BENZIGER, NICHOLAS BENZIGER, MARTIN BENZIGER, & LOUIS BENZIGER, Pl'ffs in Error,
vs.
WILLIAM H. ROBERTSON, Def't in Error.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said Court, at the Capitol, in Washington, comes the said plaintiffs in error, by Sidney Webster, their attor-

ney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was
22 given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant, and the said plaintiffs pray that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they, the said plaintiffs, may be restored to all things which they have lost by occasion of said judgment, &c.

SIDNEY WEBSTER,
Att'y for Pl'ffs in Error.

Endorsed: U. S. Supreme Court. C. Benziger *et al.*, pl'ffs in error, *vs.* Wm. H. Robertson, def't in error. Assignment of errors.
23 Sidney Webster, att'y for pl'ffs in error, 29 Nassau St., N. Y. Due service of a copy of the within assignment of errors is hereby admitted this 4th June, 1884. Elihu Root, attorney for defendant in error. U. S. circuit court. Filed June 4th, 1884. Timothy Griffith, clerk.

24 Supreme Court of the United States.

CHARLES BENZIGER, NICHOLAS BENZIGER, MARTIN BENZIGER, and LOUIS BENZIGER, Plaintiffs in Error,
against
WILLIAM H. ROBERTSON, Defendant in Error. } 7749.

And afterwards, to wit, on the second Monday of October, in the year 1884, the said defendant in error, by Elihu Root, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgement aforesaid.

And he prays that the said Supreme Court, before the jus-
25 tices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

ELIHU ROOT,
Attorney for Defendant in Error.

Endorsed: U. S. Supreme Court. Charles Benziger & *al.*, plaintiffs in error, *vs.* Wm. H. Robertson, defendant in error. Joinder in error. Elihu Root, United States attorney, attorney for defendant in error. Due service of a copy of the within is hereby admitted. New York, June 4th, 1884. Sidney Webster, attorney for plaintiffs in
26 error. U. S. circuit court. Filed June 4th, 1884. Timothy Griffith, clerk.

27 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

CHARLER BENZIGER, NICHOLAS BENZIGER, MARTIN BENZIGER, and LOUIS BENZIGER,

vs.

WILLIAM H. ROBERTSON.

Know all men by these presents that we, Benedict Brauer, of No. 329 E. 4th St., Joseph Baigon, of No. 9 Madison St., in the city of New York, county and State of New York, are held and firmly bound unto the above-named William H. Robertson in the sum of two hundred and fifty dollars, to be paid to the said William H. Robertson; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 27th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas the above-named plaintiffs have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs shall prosecute said writ of error to effect and answer all damages and costs if they fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

BENEDICT BRAUER. [L. S.]
JOS. BAIGON. [L. S.]

Sealed and delivered, and taken and acknowledged, this 27 day of May, 1884, before me—

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

28 Vol. —, page —. U. S. circuit court. C. Benziger *et al.*, pl'ffs in error, *vs.* Wm. H. Robertson, def't in error. Bond for costs on writ of error. H. J. Begly, proctor, 29 Nassau St. Filed this — day of ——, 18—. U. S. circuit court. Filed May 28th, 1884. Timothy Griffith, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

Benedict Brauer and Joseph Baigon, being duly sworn, depose and say, and each for himself says, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

BENEDICT BRAUER.
JOS. BAIGON.

Sworn to this 27th day of May, A. D. 1884, before me—
JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

I hereby approve the within bond as to form, amount, & sufficiency of the sureties.
Dated N. Y., May 28th, 1884.
ALFRED C. COXE, *Judge.*

29 UNITED STATES OF AMERICA, *ss:*

To William H. Robertson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-four, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles Benziger, Nicholas Benziger, Martin Benziger, and Louis Benziger are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.
Dated May 28, 1884.
ALFRED C. COXE.

30 [Endorsed:] 7749. U. S. Supreme Court. C. Benziger *et al.*, plaintiffs in error, against William H. Robertson, defendant in error. Citation. H. J. Begly, att'y for pl'ffs in error, 29 Nassau St. Due service of a copy of the within citation is hereby admitted this 3d June, 1884. Elihu Root, attorney for def't in error. U. S. circuit court. Filed Jun. 3, 1884. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 280. Charles Benziger, Nicholas Benziger, Martin Benziger, & Louis Benziger, plaintiffs in error, *vs.* William H. Robertson, collector of the port of New York. Filed 29th August, 1884.

122-211

Supreme Court of the United States,

OCTOBER TERM, 1886.—No. 280.

CHARLES BENZIGER, ET AL.,
Plaintiffs in Error,

vs.

WILLIAM H. ROBERTSON, COLLECTOR, ETC.,
Defendant in Error.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

R. D. MUSSEY,
Of Counsel for Plaintiffs in Error.

In The

Supreme Court of the United States,

Error to the Circuit Court

For the Southern District of New York.

Charles Benziger & al., Plaintiffs in Error, vs. William H. Robertson, Collector, etc., Defendant in Error.	No. 280.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

THE FACTS.

The articles in question were imported and entered at the port of New York by the plaintiffs under the firm name of Benziger Brothers (fol. 17).

They are known in trade and commerce as "Rosaries" (fol. 18). They are composed of beads, a metal chain and a cross, the beads being fastened on the chain at regular intervals. A rosary is not complete without a cross (fol. 17).

They are used by Roman Catholics in counting their prayers (fol. 17).

In all cases the beads are the component material of chief value (fol. 17).

The component materials of the various rosaries included in the invoices were as follows:

1. Beads, glass; chain and cross, metal.
2. Beads, wood; " " " "
3. Beads, chain and cross, all of steal.
4. Beads, bone; chain and cross, metal.
5. Beads, ivory; " " " "
6. Beads, chain and cross, all of silver.
7. Beads, mother of pearl; chain and cross, metal (fol. 18).

Rosaries are carried in the pocket when not in use, and are never worn or used for ornament (fol. 17). They are dealt in only by dealers in religious and devotional articles pertaining to the Catholic Church, and are not dealt in by those who deal generally in beads and bead ornaments, and are not known to them (fols. 17, 18).

They are known to importers and wholesale dealers as Rosaries, and are dealt in under that name, and are not dealt in under the name of beads. Dealers in rosaries also deal in the beads not made up into rosaries but fastened together on a cotton string which they sell to parties to be made up into rosaries. An order for beads would be understood to mean these beads and not the made up rosaries (fol. 18).

The defendant exacted duties at the rate of fifty per centum *ad valorem* under the provision of the Revised Statutes for "all beads and bead ornaments" (see R. S., edition 1878, title 33, Schedule M, p. 473).

The plaintiffs filed protest in writing on each entry against the exaction of 50% duties (fol. 16).

It was stipulated on the trial below that "if the jury should find the plaintiffs entitled to recover on the main issue the verdict should be subject to adjustment under direction of the Court as to the amount, and as to the per-

formance by plaintiffs of the statutory prerequisites to the maintenance of suit (fol. 16).

Assignment of Error.

The plaintiffs assign for error:

1. The refusal of the Court, on the undisputed evidence, to direct a verdict for the plaintiffs.

2. The direction of the Court to the jury to find a verdict for the defendant.

THE ARGUMENT.

The plaintiffs premise that the only question to be passed upon here is the legal rate of duties chargeable on "Rosaries."

We have nothing to do with the validity of the protests or any of the prerequisites to maintenance of suit (see fol. 16).

The several grounds stated in the protests are set forth on the record (fols. 16, 17, 18), not because their validity or sufficiency is questioned here, but for the purpose of elucidation; it being necessary to set forth so much thereof as will enable the Court to understand the claim made by the importers on each of the seven classes of rosaries in dispute.

So far, therefore, as this case is concerned, all prerequisites of the statute to enable the plaintiffs to maintain their action were duly complied with.

First Point.

ROSARIES BEING ENUMERATED, SECTION 2499 OF REVISED STATUTES IS NOT APPLICABLE.

The official ruling of the Secretary of the Treasury im-

posing the duty of fifty per centum on rosaries, is found in the Synoptical Decisions of the Treasury Department for the year 1865, and is as follows:

ROSARIES.
TREASURY DEPARTMENT,
February 1, 1865.

GENTLEMEN:

Your appeal is received (No. 2495), dated the 18th ultimo, from the decision of the Collector at New York, assessing duty at the rate of 50 per cent. *ad valorem* on certain "Rosaries."

You claim "that Rosaries cannot be called bead ornaments; nobody wears or uses them as an ornament; they are manufactured for the only purpose of devotion among Catholics. They cannot be classified as beads such as are imported on strings, because the bead itself is of very little value in comparison to the metal and the amount of labor that is necessary to make beads into Rosaries."

Samples of the articles in question have been submitted to the experts of the Customs, who report in substance as follows: That they are composed of beads is apparent; the portion of metal assists in constituting the ornament. If, however, they are not entitled to the classification of bead ornaments, then, as "Rosaries" are not enumerated in any of the existing tariff acts, and as they are composed of beads, steel, and other metal, they will be subject to the same rate of duty (50 per cent.) provided for beads, by the concluding clause in the 20th section, Act August 30, 1842.

The decision of the Collector is hereby affirmed.

The three samples enclosed in your appeal are herewith returned.

By order,

I am, very respectfully,

GEO. HARRINGTON,
Assistant Secretary of the Treasury.

To Messrs. BENZIGER BROTHERS,
New York.

The concluding clause of section 20 of act above referred to is as follows (5 Stat. at Large, p. 565):

"And on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

The language of section 2499, Revised Statutes, under which these importations were assessed, is identical.

The case of Arthur *vs.* Sussfield (96 U. S., p. 128) is decisive, that the similitude clause applies only to non-enumerated articles. In that case the Court say:

"On the part of the Government it is now insisted that the third and ninth sections of the act of June 30, 1864, give a partial description of the articles taxed; but that neither is so complete as to exclude the other, and therefore neither description can be applicable; hence it is argued that spectacles must be treated as a non-enumerated article, and that equally resembling two enumerated article, to wit: those of which steel is a component and those of which glass is a component, they must, under the similitude clause of the Act of August 30, 1842 (5 Stat., 565), pay the highest rate of duty chargeable on either of the articles they resemble.

"We are not able to assent to this course of reasoning. The similitude act applies only to non-enumerated articles. These goods are enumerated."

Let us apply this doctrine to the present case:

These articles (Rosaries) are not beads by similitude under section 2499, R. S. (p. 458), because we find enumerated each of the seven classes of rosaries produced on the trial.

Bearing in mind that in all cases the beads are the component material of chief value (Record, fol. 17), we find them all enumerated in title 33, Revised Statutes, as follows:

1st Class: Beads, glass; chain and cross, metal.

Schedule B, last clause (R. S., Title 33, p. 462): "All manufactures of glass, or of which glass shall be a component material, not otherwise provided for, * * * forty per centum ad valorem."

2d Class: Beads, wood; chain and cross, metal.

Schedule K (next to last clause, R. S., Title 33, p. 470): "Manufactures of wood, or of which wood is the chief component part, not otherwise provided for, thirty-five per centum ad valorem."

3d Class: Entire rosary of steel.

Schedule E, 25th paragraph—R. S., Tit. 33, p. 465: "All manufactures of steel, or of which steel shall be a component part, not otherwise provided for, forty-five per centum ad valorem.

4th and 5th Class: Beads, bone or ivory; chain and cross, metal.

Schedule M (R. S., Tit. 33, p. 474 at top): "Manufactures of bone * * * ivory * * * thirty-five per centum ad valorem.

6th Class: Entire rosary of silver.

Schedule E, paragraph fourth from last (R. S., Tit. 33, p. 467): "Articles not otherwise provided for made of gold, silver * * * or of which either of these metals shall be a component part, forty per centum ad valorem."

7th Class: Beads, mother of pearl; chain and cross, metal.

Schedule M (R. S., Tit. 33, p. 481, tenth paragraph from top of page): "Shells, manufactures of; thirty-five per centum ad valorem."

All of these articles therefore being enumerated, section 2499, R. S., cannot apply.

Arthur *vs.* Sussfield (96 U. S., 128).
Lottimer *vs.* Lawrence, (1 Bl., 613).

Second Point.

ROSARIES ARE NOT BEADS OR BEAD ORNAMENTS.

That they are not beads in fact, the proof is clear. Unless a piece of cloth is to be called yarn, or watches, wheels, and the like.

As to the articles in question, beads are used in their

manufacture, the bead is the part of most significance, but the chain and cross are also essential and necessary parts (fol. 17).

Neither are they bead ornaments. They are used by Roman Catholics in counting their prayers; they are carried in the pocket when not so in use, and are never worn or used for ornament (Record, fol. 17).

Third Point.

ROSARIES ARE NOT BEADS OR BEAD ORNAMENTS BY COMMERCIAL DESIGNATION.

They are dealt in only by dealers in religious and devotional articles pertaining to the Catholic Church, and are not dealt in by those who deal generally in beads and bead ornaments, and are not known to them (Record, fols. 17–18).

They are known to importers and wholesale dealers as rosaries, and are dealt in under that name, and are not dealt in under the name of beads. Dealers in rosaries also deal in the beads not made up into rosaries, but fastened together on a cotton string * * * . An order for beads would be understood to mean these last beads, and not the ones made up into rosaries (fol. 18).

The people who use rosaries sometimes call them "Beads," and sometimes Rosaries (Record, fol, 19).

The witness for the defense does not contradict the plaintiffs in this particular. His apparently sweeping statement on his direct-examination being considerably modified by his answers to questions on cross-examination, showing that he is really in accord with the plaintiffs' witnesses, and there is not a scintilla of dispute as to the facts.

To the question, "What class of people call them beads?" he answers, "Well, I think people in New York."

"Q. What class of people in New York? A. A great

many Catholics call them beads, and a great many call them rosaries.

Q. Don't the dealers call them rosaries and so catalogue them? A. Yes, sir." (Record, fol. 19.)

This is precisely the plaintiffs' proof. But it is submitted that it will take some thing more than the occasional (not by any means general) designation of those articles as beads by those who make use of them, and who never deal in them, to fix upon them the name of beads by commercial usage if they are not beads in fact.

The doctrine of commercial designation has been so clearly and repeatedly defined by this Court that the plaintiffs do not feel at liberty to consume time by discussion of the subject.

200 Chests Tea (9 Wheat 430).
Elliott *vs.* Swartwout (10 Pet., 137).
Curtis *vs.* Martin (3 How., 106).
Arthur *vs.* Davies (96 U. S., 135).
U. S. *vs.* Breed (1 Sumn., 150).

The judgment should be reversed, and a *veniri de novo* ordered.

R. D. MUSSEY,
Of Counsel for Plaintiffs in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1886.

CHARLES BENZIGER, NICHOLAS BENZIGER, Martin Benziger, and Louis Benziger,
vs.
WILLIAM H. ROBERTSON, COLLECTOR OF the port of New York.
No. 280.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF ARGUMENT FOR DEFENDANT.

The duty on the beads concerning which this suit was brought, was levied under a clause in schedule M of the tariff act T. I. O., No. 281, and is "All beads and bead ornaments, except amber, fifty per centum ad valorem." The importers claim the duty should have been assessed at 35, 40, and 45 per cent., as manufactures of glass, metal, wood, and silver, under schedules B, E, K, and M, respectively. The articles were invoiced as rosaries. The protest admits they were chargeable with duty, hence the evidence that they were called rosaries by dealers becomes immaterial, except to show they were not "beads or bead ornaments," for the "importer must indicate by his protest the distinct ground of his objection to the charge and show his intention to claim the excess (2 Black, 461).

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